United States Court of Appeals

for the Second Circuit

APPELLANT'S BRIEF

UNITED STATES COURT OF APPEALS
SECOND CIRCUIT

MABEL M. CASE,
d/b/a/ CASE NURSING HOME,

Plaintiff,
Appellant,

-vs.-

CASPAR WEINBERGER, as Secretary of the United States Department of Health, Education & Welfare; BERNICE L. BERNSTEIN, as Regional Director for Region II of the United States Department of Health, Education & Welfare; ALAN J. SAPERSTEIN, Director, Office of Long Term Care, Region II, HLW; ABE LAVINE, Commissioner of the New York State Department of Social Services; and JOHN LASCARIS, Commissioner of the Onondaga County Department of Social Services,

Defendants,
Appellees.

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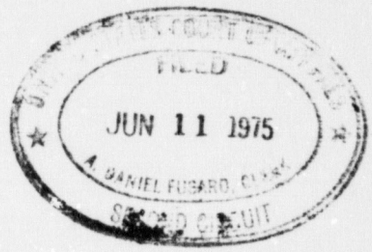
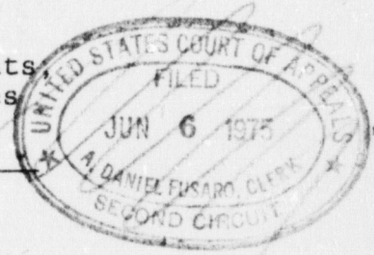
SECOND CIRCUIT
DOCKET NO. 75-6038





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ISSUES PRESENTED FOR REVIEW

I. Whether a nursing home operator, who has been a Medicaid provider of services for many years and who would continue to be such a provider but for claimed fire safety deficiencies is constitutionally or statutorily protected against closure without a full administrative adversary hearing on Life Safety Code deficiencies and the waiver thereof prior to the removal of patients?

II. Whether the Secretary of Health, Education and Welfare's actions in determining that the nursing home had deficiencies and was not entitled to waivers were unlawful and must be set aside under the Administrative Procedure Act?

I. STATEMENT OF THE CASE

A. Proceedings in United States District Court, Northern District of New York.

On April 18, 1975, plaintiffs[1] filed their complaint in this action with the Hon. Edmund Port, United States District Judge, Northern District of New York, and at the same time, obtained an order directing the Appellees herein to show cause on the 28th day of April, 1975, why a three-judge court should not be convened pursuant to 28 U.S.C. § 2282 to restrain the enforcement, operation, and execution of 42 U.S.C. § 1396a(a)(28) as repugnant to the United States Constitution; alternatively, why a preliminary and permanent injunction, directing the defendants to afford plaintiffs full administrative hearings, with administrative and judicial review, prior to decertification and the removal of Medicaid patients should not be granted; and why review, pursuant to the provisions of the Administrative Procedure Act, 5 U.S.C. § 706(1) and (2) A-E should not be afforded. Pending obtaining the relief requested, plaintiffs sought preliminary temporary relief. On April 28, 1975, Hon. Edmund Port temporarily

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(1) Since the institution of this appeal, Appellant Louise Ungaro d/b/a Phillips Nursing Home has agreed to voluntarily surrender her New York State operating certificate to the New York Department of Health. Because the case is now moot as to her, counsel will move on the oral argument of this matter, for a voluntary dismissal of the appeal as to that appellant, without costs, pursuant to Fed. Rule of App. Proc. 42(b).

restrained the defendants from removing Medicaid patients from the plaintiffs' facilities and from terminating reimbursement to plaintiffs pending a full hearing on the merits, scheduled for May 7, 1975.

The hearing on the merits which consisted primarily of the papers before the court, a few stipulations, and the oral testimony of one witness, centered on the issues raised plaintiffs' complaint. Those issues, briefly summarized, were whether the plaintiffs, under the due process clause of the Fifth and Fourteenth Amendments, were entitled to a full administrative adversary hearing prior to a determination of the Federal defendants to deny waivers of Life Safety Code violations; whether the Social Security Act, by providing hearings to Medicare providers and not to Medicaid providers, invidiously discriminated against the plaintiffs in violation of the United States Constitution; whether, alternatively, plaintiffs were entitled to such hearings under the Social Security Act; and whether the actions of the defendants were unlawful under the various provisions of the Administrative Procedure Act.

On May 8, 1975, the Hon. Edmund Port dictated the Court's findings of fact and conclusions of law from the bench. By judgment and order entered May 12, 1975, the Court ordered that the defendant, Weinberger, upon written request served upon him by a plaintiff within 30

days from the date of entry of the order, afford a full administrative adversary hearing within 90 days thereafter with respect to the Life Safety Code, said hearing to be in conformity, as far as practicable, with the provisions of 42 U.S.C. § 405(b). The Court denied all other relief demanded in the plaintiffs' complaint, and the Court further denied the motion of plaintiffs for the convention of a three-judge court.

The Court provided in its order that the stay previously granted was to be continued for a period of 10 days from the entry of the Judgement and Order in order to give the parties sufficient time to seek further relief in the Court of Appeals.

On May 27, 1975, plaintiffs sought a stay in this Court The plaintiffs' application was denied, but the Court ordered an expedited appeal. Both the plaintiffs and the Federal defendants have filed notices of appeal.

B. Factual Background of Proceedings.

The facts surrounding this case have never been in serious dispute. Rather, as the answer to the complaint, as well as supporting affidavits and memoranda of law filed by the defendants would indicate, the controversy has centered on the entitlement to relief which the plaintiff claims must flow from the operative facts.

Appellant, Mabel M. Case, is and has been the owner and operator of the Case Nursing Home, a skilled nursing facility, for many years. The Case Nursing Home has been in the same location for at least 38 years and has always been owned by members of the Case family. (Glessing Affidavit, Index No. 14). Mrs. Case has participated in the Medicaid Program as a provider since the program's inception, and of the 21 patients for which the nursing home is certified by the State of New York, 18 beds are occupied by Medicaid patients. The income generated by both private patients and Medicaid patients is approximately $11,000.00 per month, Medicaid reimbursement comprising approximately $9,700.00 of that amount. The monthly expenses of the nursing home total a little over $10,000.00. (Glessing Affidavit, Index No. 14). In that affidavit submitted in support of the application for temporary, preliminary and permanent relief, Charles A. Glessing, the administrator of the Case Nursing Home, pointed out that the nursing home survives on its Medicaid reimbursement; that requests for private patient beds have been minimal; that the facility would not be able to remain open without its Medicaid patients.

Prior to the fall of 1974, plaintiff operated its skilled nursing home as a provider, in almost an undefined status. After this Court decided Maxwell v. Wyman, 458 F.2d

1146 (2d Cir. 1972), the nursing home was afforded a "hearing" by the State of New York. At that hearing, no hearing officer was present, and none of the testimony taken was sworn. As a result, after the nursing home commenced an Article 78 action in the New York courts, the State of New York stipulated that the nursing home would be entitled to a new hearing. That hearing was held in the spring of 1973, but because of the shift in authority from the State to the Federal Government in July, 1973, in connection with Life Safety Code volations and waivers thereof, no decision has ever been rendered following the hearing. (Wineburg Affidavit, Index No. 14).

Although surveys made by the State Survey Agency concerning fire safety had been made as early as September 8, 1972, the Case Nursing Home was not notified of the deficiencies by the Department of Health, Education and Welfare until November 5, 1974. (Transcript, Index No. 72, list of Exhibits, Exhibits 1 and 5). The letter of November 5, 1974 enclosed a list of deficiencies and advised the nursing home that the facility did not comply with the provisions of the Life Safety Code and was not entitled to a waiver of the deficiencies. Other than a listing of the deficiencies and a recitation that the deficiencies did exist, no reasons were given why waivers of the deficiencies would not be granted. The letter further invited the

facility to request a review before the Program Director, Office of Long Term Care Standards Enforcement within seven days of the date of the letter. (Transcript, Index No. 72, Exhibit 5). By letter of November 9, 1974, the administrator of the Case Nursing Home did request such a review. (Id. Exhibit 6).

The guidelines for the review were set forth in a letter to Michael A. Wineburg, in connection with the Phillips Nursing Home. (Transcript, Index No. 71, Exhibit 8). Those guidelines included an identification of the presiding officer, a statement that the facility would have the opportunity to be heard, a notation that the proceedings would be taped, and an anticipation that the proceeding would take no more than two hours. Additionally, the nursing home was advised that the State and Federal personnel involved would be available to answer questions concerning erroneous factual findings. The right to question would be limited where the purpose appeared to be harassment.

The nursing home attended the review with counsel and a fire safety consultant. At the review, after counsel's preliminary statement, counsel and the fire safety expert proceeded to go through the list of alleged violations, respond to them, and offer suggestions concerning means of improvement to arrive at greater technical compliance with the Life Safety Code. The review was conducted

by Morton C. Berkowitz, a staff officer of the Office of Long Term Care Standards Enforcement.

As to the availability of government personnel to answer questions at the meeting, the following is noted:

The September 8, 1972 survey was conducted by Ralph M. Weinstein and reviewed by William Goleb. The December 20, 1973 survey was conducted by Ronald Sharpe, and reviewed by an associate engineer whose name is illegible on the survey. The October 21, 1974 survey was conducted by Nelson Hettler of the Department of Health, Education and Welfare. (Transcript, Index No. 72, Exhibits 1-4). Nevertheless, only Mr. Sharpe was present at the review. (Transcript, Index No. 72, transcript, cover). Almost immediately after the discussion opened on the Case Nursing Home (Transcript, Index No. 72, transcript, pages 42-44) counsel did attempt to take advantage of the limited opportunity to question concerning factual findings. Although Mr. Sharpe was present, he was unable to answer the questions. Two voices indicated that Mr. Pike made the survey, and Mr. Pike was not present. Mr. Pachillo did attempt to answer the question, but his answer was based upon guess work.

Following the review, after consultation with the fire safety consultant, counsel did submit a proposed plan of correction and improvement on January 20, 1975. (Transcript, Index No. 17, Exhibit 7). Despite the representations

of the Department of Health, Education and Welfare during the review that the procedure to be followed would be one of "give and take," the only response to the letter of January 20, 1975, was the Department's letter of March 25, 1975. (Transcript, Index No. 72, Exhibit 8). In that letter, Alan J. Saperstein, Director of Office of Long Term Care Standards Enforcement, recited that he had reviewed all of the documents in front of him, as well as the statements made during the review before him on December 17, 1974, and determined that the Case Nursing Home did not, and would not as a result of promised corrections, comply with the equivalent fire safety standards necessary for his office to find that the safety of patients would not be in jeopardy.

In response to the Order to Show Cause, as well as at the trial, the parties submitted additional affidavits and documents to shed light on the issues before the Court. Plaintiffs submitted an affidavit of James P. Regan, reciting his qualifications, his relationship to the Case Nursing Home from the inception of the earlier Maxwell Hearings through the present proceedings, and stating his fire-safety expert opinion that pending hearings on Life Safety Code violations and entitlement to waivers, the lives of the patients in the Case Nursing Home would not be placed in jeopardy. (James P. Regan Affidavit, Index No. 143). In a supplemental affidavit, sworn to on the first day of trial, May 7, 1975, Mr. Regan pointed out that although he

had participated in approximately ten "reviews," the first time that the "standards" set forth in Mr. Saperstein's affidavit of May 5, 1975, (Alan J. Saperstein Affidavit, Index No. 101) were brought to his attention were in that affidavit. (James P. Regan Affidavit, Index No. 211). Mr. Regan further pointed out that the standard set forth in the affidavit, and attached documents, a so called "wood-frame construction plus one" standard was neither realistic nor in conformity with the letter or spirit of the Life Safety Code.

The federal defendants, in opposition to the plaintiffs' request for temporary relief, offered an affidavit of Alan J. Saperstein, setting forth what procedures had been followed in connection with the ultimate denial of waivers to the Case Nursing Home. (Alan J. Saperstein Affidavit, Index No. 62). In that affidavit, Mr. Saperstein confirmed that as early as December, 1973, Emilio Puchillo, the Chief of Design and Engineering, FECA, concurred with the state's negative findings concerning the waiver of Life Safety Code deficiencies. The decision was reached and communicated to the New York State Department of Health on January 9, 1974. In September, having had no further communications from the Department of Health, Education and Welfare, the New York State Department of Health made an inquiry. As a result of the inquiry, the review of the Case Nursing Home was initiated.

In a pre-trial conference, the federal defendants stipulated that a tape recording of the review conducted in December, 1974, had not been transcribed prior to the time the determination of March 25, 1975 denying waivers. It was further stipulated, that although Mr. Saperstein did speak with the presiding official, Mr. Berkowitz, Mr. Saperstein had not listened to the tape of the proceeding prior to his March 25, 1975 determination. (There was no testimony concerning whether or not Mr. Berkowitz had listened to the tape prior to the determination). The federal defendants also introduced an affidavit of Nelson L. Hettler, the Federal engineer who conducted the October 21, 1974 survey. (Nelson L. Hettler Affidavit, Index No. 115). The affidavit marked the first time any type of reasoning for the Department's decision to deny waivers or any of the Secretary's criteria regarding such were ever revealed to Appellant. Attached to the affidavit was an analysis of the plan of correction and improvement and a recitation of the reasons why waivers could not be granted. It is noted that this analysis was not prepared until April 29, 1975, the day after Judge Port granted the temporary restraining order.

At trial, the only oral testimony presented was that of a representative of the defendant Lascaris. Although a record of the testimony has not yet been transcribed, counsel recalls it to be that there were approximately 179 persons waiting in hospitals and their own homes

in Onondaga County for nursing home beds. Additionally, if patients were to be removed from Case Nursing Home, Phillips Nursing Home, and other nursing homes scheduled for the denial of waivers, there would be the need for an additional 135 beds. As of May 5, 1975, there were 3 beds available in Onondaga County, and in the past, it has been necessary to transfer patients as far away as Erie and Westchester Counties. In short, the testimony may best be summarized as showing a need for Medicaid beds which surpassed the availability.

Based upon all that was before him, the Hon. Edmund Port, on May 8, 1975, dictated a lengthy decision from the bench. Early in that decision, the court pointed out the Second Circuit's reversal in the Maxwell case of his failure to find irreparable injury. (Decision, page 8). He further pointed out that the numbers in Maxwell were more substantial than the numbers in the present case. (Decision, page 18). The court was primarily concerned with the safety of the patients, and found that those in their own homes were receiving some treatment, and those in hospitals were receiving treatment. Consequently, the court inferred that the need for beds was exaggerated. The court also found that there were substantial health related facility beds available. (Decision, page 20). The court reasoned that in view of the need for nursing home beds, the facilities losing Medicaid patients, allegedly because they are

unsafe, would nevertheless not be irreparably injured. The court reasoned that plaintiffs' contention to the contrary was answered by "how much attention is paid to yesterday's newspaper." (Decision, page 24). The court further stated that plaintiff could minimize its loss if it could qualify as a health related facility. (Decision, page 31). Balancing patient safety against the dollars in the tills of nursing homes (Decision, page 26-27), the court concluded that plaintiffs' "due process rights" did not include a full administrative adversary hearing prior to the determination of the Department of Health, Education and Welfare or prior to patient removal.

The court did conclude, however, that the Constitution required, at some point in the proceedings, a full administrative adversary hearing. (Decision, pages 30-31). The court felt that a post termination hearing would protect the interests of all involved, and that if the hearing were conducted with dispatch, the nursing home's loss during the "short period will not be irreparable by any stretch of the imagination." (Decision, page 32). Accordingly, the court ordered that hearings be conducted within 90 days after a request by the nursing home. Despite the expression of counsel's concern that hearings held with all deliberate speed may be a hollow right, without similar time limits upon the rendering of decisions by administrative law judges

and by the Appeals Council, the court would not expand on the order. (Decision, Page 38-39).

II. ARGUMENT

APPELLANT IS ENTITLED TO A FULL ADMINISTRATIVE ADVERSARY HEARING AT SOME POINT PRIOR TO THE REMOVAL OF PATIENTS.

(1) Due Process Requires a Full Administrative Adversary Hearing.

It has not been disputed that plaintiff has substantial property and liberty interests meriting the strongest protection. But for the determination to deny waivers, plaintiff would continue, as it has in the past, to serve as a provider of skilled nursing services. Certainly the facility's operating certificate -- its right to exist-- is a substantial property. Although the operating certificate of the plaintiff has not been attacked in this proceeding, a decertification as a provider with the concomitant removal of Medicaid patients is tantamount to a limitation on plaintiff's operating certificate and the impairment of substantial property. See Maxwell v. Wyman, 458 F.2d 1146, 1151 (2d Cir. 1972).

In the leading case of Ross v. State of Wisconsin Dept. of Health & Social Serv., 369 F. Supp. 570 (E.D. Wisc. 1973), a three-judge court was called upon to decide the constitutionality of a state statute permitting the withdrawal of patients from a nursing home in an emergency, without a hearing prior or subsequent to the determination.

The Court noted that the nursing home owner's liberty may be placed in jeopardy because arguably, the action taken could "seriously damage his standing and associations in his community." Id at 571, citing Board of Regents v. Roth, 408 U.S. 564, 573 (1972). The Court did not decide the "liberty" question because of the clear "property" interest to be protected. The Court pointed out that nursing home operators have more than "an abstract need or desire to retain patients for whom public support is received, as well as more than a unilateral expectation of so doing. They have a 'claim of entitlement***.' "Ross v. State of Wisconsin Dept. of Health & Social Serv., supra at 572. Although the concurring opinion could not find a "property interest" to protect, Chief District Judge Reynolds did stress that a "determination by the Government that a nursing home is unsafe or unhealthy not only damages its standing in the community but also prejudices its ability to attract and retain private patients and thus puts its very existence in jeopardy." Id at 573. Such an infringement upon the nursing home's "liberty interest" required a full hearing under the Due Process clause of the Constitution.

A similar approach was taken by the Court in Paramount Convalescent Center, Inc. v. Department of Health Care Services, 43 C.A.3d 35 (Cal. Ct. App. 1974). In that case, an attempt was made to cut off a nursing home's provider agreement without a hearing. The California Court of

Appeals, after noting that, as here, the right to continue participating as a provider would continue as long as the nursing home was qualified to participate, held that before the nursing home could be deprived of that "property right," due process required a hearing on eligibility to continue participating as a provider. See also Goldberg v. Kelly, 397 U.S. 254 (1970); Coral Gables Con. Home, Inc. v. Richardson, 340 F. Supp. 646 (S.D. Fla. 1972). See generally, Langhorne Gardens, Inc. v. Weinberger, 371 F. Supp. 1216 (E.D.Pa. 1974); Temple University v. Association of Hospital Services of Philadelphia, 361 F. Supp. 263 (E.D.Pa. 1973).

(2) The Granting of Hearings to Dissatisfied Medicare Providers Requires that Similar Relief be Afforded Dissatisfied Medicaid Providers.

Assuming arguendo that as an isolated proposition, that which was afforded appellant was all that was constitutionally required or that no hearing or review is constitutionally required, in the total scheme of the Social Security Act the failure to provide plaintiff with the right to a full administrative adversary hearing constitutes an invidious discrimination and a denial of equal protection of the laws. Despite the right of virtually every person, whether an applicant for disability benefits, an AFDC or Medicare recipient, or otherwise, to the full panoply of

administrative applications, determinations, reconsiderations, hearings, appeals, and judicial review under the Social Security Act, according to the Federal defendants, it is only the Medicaid skilled nursing facility provider who should be denied such due process.

It is unquestioned that Medicare providers are entitled to hearings and judicial review when dissatisfied with a determination by the Secretary that they do not comply with the conditions of participation. 42 U.S.C. Section 1395 ff(c) (1964). If it were determined that a Medicare provider did not comply with the Life Safety Code provisions and that waivers should not be granted, the Medicare provider would receive reconsideration, a hearing before an Administrative Law Judge, an administrative appeal, and judicial review. The Medicaid provider next door, could, under the statute as applied by the Federal defendants, be closed without the same rights.

There is no question that there are distinctions, as found by the District Court, between Medicaid and Medicare. Those distinctions, however, are relevant to neither the issues before the Court nor the purpose of Congress in imposing Life Safety Code compliance upon both Medicaid and Medicare providers in order to "properly protect the health and safety of patients." Senate Report No. 744, 2 U.S. Code Cong. & Admin. News 3028 (1967). Fire hazards, fire, and patient safety cannot distinguish between facilities that are Medicaid providers and those that

are Medicare providers. The interests of the government and of the patients in each type of facility are identical.

In 1967, the drafters of Title XIX imposed upon states without fire protection codes the requirement that skilled nursing homes meet the Life Safety Code, the same Code governing Title XVIII providers. Unlike Medicaid, however, enforcement and determinations concerning waivers were left to the states. The 1972 amendments to the Social Security Act made enforcement and waiver determination solely a Federal function, thus providing a greater parity between Medicaid and Medicare providers. Notwithstanding the identity of interests, standards, and determinations between Medicare providers and Medicaid providers, at least with respect to the Life Safety Code, the Federal defendants' approach to enforcement of the Social Security Act would deny the Medicaid provider the rights granted the Medicare provider. Although Congress has the right to legislate with classifications, the Constitution does not permit different treatment via classification on the basis of criteria wholly unrelated to the purpose of the statute. The classification, as drawn by the Federal defendants is unreasonable, arbitrary, and does not rest upon some ground of difference having a fair and substantial relation to the object of the legislation. The Medicare and Medicaid providers, under similar equal circumstances are not treated

alike, in violation of the Constitution. See Johnson v. Robison, 415 U.S. 361 (1974); Reed v. Reed, 404 U.S. 71 (1971); Royster Guano Co. v. Virginia, 253 U.S. 412 (1920). See also Weinberger v. Wiesenfeld, ____U.S.__, 43 Law Week 4393 (March 18, 1975).

(3) Alternatively, Plaintiff is Entitled to a Hearing Under the Social Security Act.

Under Title XVIII of the Social Security Act, any institution dissatisfied with any determination by the Secretary that it is not a provider of services is entitled to a hearing thereon by the Secretary after reasonable noti and opportunity for hearing, and to judicial review, to the same extent as is provided in 42 U.S.C. §405. 42 U.S.C. §1395 ff(c).

As a general matter, standards and determinations regarding Title XVIII (Medicare) providers are a federal matter, and standards and determinations regarding Title XIX (Medicaid) providers are state matters. However, particularly since July 1, 1973, skilled nursing facilities have been an exception. By §246 of Public Law 92-603, said section being entitled "Uniform Standards for Skilled Nursing Facilities Under Medicare and Medicaid," Congress provided that a Medicaid skilled nursing facility must satisfy all of the conditions of participation of a Medicare facility (42 U.S.C. 1396 a(a) (28), which provides a Medicaid nursing home must satisfy the requirements of a

Medicare nursing home as set forth in 42 U.S.C. §1395 x(j)). More particularly, whereas previously, determinations of Life Safety Code violations and waivers thereof were made by state agencies (42 U.S.C. §1396a(a)(28)(F)(1)), Congress deleted this section, and amended §1395 x(j)(13), to provide that the Secretary of Health, Education and Welfare would make such determinations with respect to Medicaid homes. In short, to qualify as a Title XIX provider, a skilled nursing facility must qualify as a Title XVIII provider, and specifically, to qualify in regard to the Life Safety Code, it must do so under Title XVIII, as determined by the Secretary under Title XVIII.

As such, the Medicaid providers come within the plain words of the Title XVIII rights, 42 U.S.C. §1395 ff(c)--they are institutions dissatisfied with a determination by the Secretary that they are not providers of services, and accordingly are statutorily entitled to hearings, and administrative and judicial review.

There is absolutely no indication in the amendments themselves, or their legislative history, that Congress intended to have Medicaid skilled nursing facilities have the obligations of Title XVIII, but not the rights of Title XVIII. Rather, the history shows a contrary intent. In the House version of the 1972 Social Security Act Amendment, the Secretary was to be given authority to terminate payments to suppliers of services under both Medicare and Medicaid; immediately following a statement of the respective effective dates of these Medicare and Medicaid provisions,

the House Committee report stated that any person or organization dissatisfied with the Secretary's determination to terminate payments would be entitled to a hearing by the Secretary and to judicial review of the Secretary's final decision. House Committee Report, 2 U.S.Code Cong. & Admin. News 5085-86 (1972). Moreover, as the House-Senate Conference Report shows, there was even discussion of having the Secretary make all Medicaid eligibility determinations, in addition to Life Safety Code determinations, although this was not adopted. Id, Pages 5388-90. What is instructive in this history is that whatever particular determinations that were ultimately to be given to the Secretary, there is no intimation whatsoever that they were not to be subject to the hearing and review procedures governing the Secretary's determinations; moreover, it was the express intention of the House that such determinations would be subject to hearing and review. Nothing in the history or the law as adopted altered that.

It is all the more unlikely that Congress intended to deny hearing rights to Medicaid nursing facilities on the Life Safety Code waiver issue in light of the past history of controversy surrounding this point. When in 1971 State authorities attempted to terminate Medicaid skilled nursing facility participation due to alleged nonwaivable Life Safety Code violations, without hearings, this Court termed the Federal-State by-play a "wondrous bureaucratic shell game." Maxwell v. Wyman, 458 F.2d 1146, 1149 (2d Cir. 1972). The nursing homes were granted state hearings, and a

number of them succeeded in obtaining waivers either at the hearing level, or upon judicial review. Thereafter, Federal-State sparring reflared in what might be termed "The Shell Game--Part II." At this point, HEW claimed that even though the state was required to reimburse Medicaid providers while their waiver cases were obtaining judicial review, the Federal government did not have to do so. Once again, the shell game was closed down by this Court, and in so doing it stated that it "recognizes the vigorous campaign to upgrade nursing home care...but this does not mean that Federal and State procedures can be arbitrary ... ." Maxwell v. Wyman, 478 F.2d 1326 (2d Cir. 1973).

Finally, the present, and what might be termed "The Shell Game--Part III." Under this version, the state claims, successfully, and with federal acquiescence, that since the 1973 amendment took the waiver power away from the State and gave it to the Secretary, it should no longer be required to grant hearings regarding waivers. At the same time, and with the acquiescence of the state, the federal authorities are urging here that since Medicaid is a state program, the Secretary is not obligated to give hearings. The current version of the game ought fare no better than its predecessors.

(4) The Nursing Home is Entitled to its Hearing Prior to the Removal of Patients.

The nursing home's entitlement to a hearing, regardless of the theory, would appear clear cut. To be a meaningful right, the hearing must be conducted at some point prior to the removal of patients.

To the extent that the District Court found that hearings conducted after the removal of patients would not cause the nursing home irreparable injury, those findings are clearly erroneous and must be set aside. Admittedly, plaintiffs' assertions below that they would be forced out of business were self-serving. Nevertheless, the assertions were not based upon speculation and fear, but rather upon facts and certainty. The Case Nursing Home stands to lose 18 of its 21 patients. The facility has not had a history of large numbers of private patients, and the facility has survived on its Medicaid patients. To remain open after the Medicaid patients are removed, in hopes that private patients would filter in, would require the continuation of a constant overhead with the substantial loss of revenues. This home, showing at best $1,000.00 a month profit, is ill-equipped to operate even for one month on gross revenues of less than $2,000.00.

Additionally, it is also unrealistic to expect that a nursing home, whose patients have been removed

because a Federal agency has made a determination that the facility is not safe from a fire safety point of view, will be flooded with private patients, especially in view of the adverse publicity surrounding the removal.

On the irreparable injury issue, Judge Port's analysis was almost identical to his analysis noted in Maxwell v. Wyman, 458 F.2d 1146 (2d Cir. 1972), which this Court did not find persuasive. The Court's attention is also called to the affidavits in the record on appeal in Maxwell in support of the relief ultimately granted; they detail less regarding injury than has appellant Furthermore, there is no proof in appellant's record to support a finding that the nursing home could minimize its loss by converting to a health related facility. It is again unrealistic to expect a successful conversion in light of the Life Safety Code determination already made. The New York Hospital Code adopts the Life Safety Code as a measure of safety. Against the background of federal-state interplay on the fire safety surveys and determinations previously made, it is doubtful, at best, that approval for the conversion would be forthcoming.

With the open ended procedure outlined in Judge Port's order, it is clear the nursing home would long have been closed before a decision after a hearing was reached.

Once again, Ross v. State of Wisconsin Dept. of Health & Social Serv., supra, is instructive. Although the majority and concurring opinions differed

on the interest to be protected, all agreed that a hearing, to be meaningful, must be conducted prior to patient removal. The Court did not, however, mandate pre-removal hearings in all instances, recognizing that the "nature of the government's interest in protecting residents of of private nursing homes from true emergency situations posing serious threats to their health and safety may justify different treatment in those situations." Id. at 572. The Court did not feel it appropriate to attempt to define which violations and deficiencies would constitute true emergency conditions; they did note that the period interposed between the assertion of violative conditions and patient removal suggested that the conditions were not so serious as to preclude a pre-removal hearing. See generally Bell v. Burson, 402 U.S. 535 (1971); Goldberg v. Kelly, supra.

That a true emergency did not exist with respect to the Case Nursing Home is clearly supported by the time table of events. Although the State of New York had the right to commence proceedings pursuant to Article 28 of the Public Health Law to revoke the operating certificate of the Case Nursing Home, subsequent to this Court's decision in Maxwell v. Wyman, supra, it chose not to do so. Rather, following the Court's decision in Maxwell, the state chose to commence proceedings to decertify the Case Nursing Home as a provider. Prior to the time that Congress legislated a

shift in waiver determination authority from the State to the Federal Government, the State of New York had conducted a fire safety survey which served as one of the surveys used by the Federal defendants in denying waivers. Although that survey was completed in September, 1972, the Federal government did not make its request for the surveying agency recommendation until over one year later, on November 9, 1973. (Transcript, Index No. 72, Exhibit 2). An additional survey was conducted in December, 1973, and a decision not to grant waivers was communicated to the New York State Department of Health in early January, 1974. Presumably because the determination was not followed up by the Federal defendants, the State Department of Health, in September, 1974, asked the Federal defendants for a status report. After pursuit by the State of New York, in October 1974, the Federal government conducted a survey, and the next month notified the Case Nursing Home of its right to a review. The review was conducted in December, 1974, and on January 20, 1975, the home's plan of correction and improvement was submitted. It was not until over two months later that the Office of Long Term Care Standards Enforcement advised the nursing home of its determination. Even after that determination, there were some 45 days before the patients would be moved from the Case Nursing Home.

If the lack of compliance with the Life Safety Code created an emergency for the patients, such an emergency could hardly be inferred from the defendants' lack of

pursuit from July 1, 1973. Indeed, two of the three surveys done prior to October 1974, were done by New York Department of Health employees. If an emergency existed, surely the the New York Commissioner of Health would have temporarily suspended or limited that certificate, pursuant to §2806-a of the New York Public Health Law on a finding by the department that public health or safety was in imminent danger. It would strain credibility to claim that on the narrow grounds asserted for termination of provider agreements that there was not an abundance of time in which to convert delay and wheel spinning into a meaningful administrative hearing process. At a minimum, there was ample time within which to conduct a hearing following HEW's determination between the date of that determination and the date by which patients were scheduled to be removed. See, e.g. Coral Gables Con. Home, Inc. v. Richardson, supra.

Admittedly and justifiably, against the nursing home's interest in remaining in business and the government's interest in enforcing its regulations are the interests of the patients and of the public. In view of the time within which defendants sought to enforce the Life Safety Code requirements, it can hardly be asserted that an additional month, if an additional month be needed, would be against the public and patient interests. The testimony at trial made it clear that there is a serious need for nursing homes. Had not this Court ordered hearings in 1972, at

least 22 nursing homes, who were successful at the hearing level in their claim that they should not be decertified as providers, and many more at the appellate level, who were successful in asserting that the state's findings concerning patient safety were not supported by substantial evidence, would have been closed to their own detriment and to the detriment of the public. See Maxwell v. Wyman, 478 F.2d 1326 (2d Cir. 1973); Maxwell v. Lavine, 41 App. Div.2d 346 (3d Dep't 1973). To afford meaningful hearings long after the event when the nursing home is closed, would serve all interests inadequately and no interest properly. Congress did not envision such an ineffective remedy when, in Senate Report 404, U.S. Code, Cong. & Admin. News, pages 1991-1992 (1965), it was noted that:

> The Secretary could terminate an agreement only after reasonable notice and only if the provider (a) does not comply with the provisions of the agreement or law and regulations, (b) is no longer eligible to participate, or, (c) fails to provide data needed to determine what benefit amounts are payable or refuses access to financial records for verification of bills. The Secretary would be required to give reasonable notice and opportunity for hearing to a provider of services before making a final determination that a provider does not qualify to participate under the program or before terminating an agreement with a provider. The final administrative decision is subject to judicial review. (Emphasis supplied).

Nor should the due process clause of the Constitution be rendered so meaningless.

In the proceedings below, as authority for the

proposition that hearings are not required, and if required, are not required prior to patient removal, the Federal defendants cited Nicobatz v. Weinberger, ___ F. Supp. ___ (C.D. Cal. 1974). This case appears to be the only case lending support to the defendants' position. Initially, it must be pointed out that the Court in Nicobatz had a difficult time finding a right to be protected. The rights of the Case Nursing Home to be protected are clear. Apparently, in line with appellant's position, the Nicobatz Court did find that the situation approached an emergency. The violations claimed were not confined to fire safety violations, but rather extended to operating deficiencies, going to the medical and nursing care being afforded the patients. The decision to terminate the provider agreements came after numerous inspections over a two year period with conferences, consultations, and numerous attempts between the government and the nursing home to work toward correction and improvement. Only after nothing was done was the determination made to cancel the provider agreements, and even then, the nursing home was given a reconsideration. The spirit of cooperation and attempt to work toward improving the nursing home in this instance is, at best, one-sided only. To the extent that the Court in Nicobatz concluded that a post-termination, post-removal hearing was adequate, it is respectfully urged that the Court's reliance on Coral Gables, which ordered pre-termination hearings, and

upon Goldberg v. Kelly, were misplaced and not controlling under the facts of this case.

Additionally, the type of situation in Wilson Clinic & Hospital, Inc. v. Blue Cross of South Carolina, 494 F.2d 50 (4th Cir. 1974), is readily distinguishable from the case at bar. In that case, it was only after numerous conferences and numerous opportunities to be heard on a clear cut financial determination, under guide-line readily known to the nursing home, that payments were ordered recouped prior to a hearing. In that case, however, the nursing home could continue in business, since only one-third of its patients were Medicare or Medicaid patients, and the nursing home would not be forced out of business pending a meaningful and substantial review. In view of the facts of that case, hardly similar to the facts of this case, it was not unexpected that the Court of Appeals would conclude that the clinic had not been aggrieved by the lack of a single syllable of due process.

The Federal defendants have also contended that their "review procedure" was an adequate substitute for the minimal due process rights which the nursing home contends it is entitled to under Ross v. State of Wisconsin Dept. of Health & Social Serv. , supra, Paramount Convalescent Center, Inc., v. Department of Health Care Services, supra, and Goldberg v. Kelly, supra. In support of the proposition

that due process is a flexible concept, the government has twice cited Hannah v. Larche, 363 U.S. 420 (1960) and Morrissey v. Brewer, 408 U.S. 471 (1972). In Hannah the process involved was an investigative process, and the Supreme Court clearly pointed out that when the investigative process shifted to an adjudicative process, more substantial due process rights attached. HEW's determination marked a clear shift from mere investigation to adjudication. It is also clear that the Case Nursing Home has not received the minimum rights which the Supreme Court decided must be afforded to a parolee in a revocation proceeding. In fact, the rights set forth in Morrissey closely resemble those which the plaintiffs have alleged are due under Ross.

The Case Nursing Home did receive advanced notice of alleged violations and Life Safety Code deficiencies. But the letter to the Case Nursing Home of November 5, 1974, specified not only that the facility did not meet the requirements of the Life Safety Code but also that the facility was not entitled to a waiver. To be meaningful, the advance notice should not only have listed the deficiencies but also should have apprised the nursing home of the standards and policies being applied and reasons for the denial of the waivers. Although Congress manifested a clear intent to grant waivers of Life Safety Code provisions, the Federal government's notice seemed to imply that waiver of the Life Safety Code deficiencies was impossible because deficiencies existed.

The nursing home was provided with neither a detailed written statement of the evidence relied upon nor a decision made by a neutral and detached hearing officer or decision making body. Alan J. Saperstein, who made the final determination, was the superior of those persons in his office responsible for the recommendations. He was not present at the review, and although he did discuss the review with his assistant, Mr. Berkowitz, he did not listen to the tape recording of the review and did not have a transcript of the review available prior to his making the determination. With respect to the evidence, there was never a significant reference to evidence relied upon, and, in fact, the only significant "evidence" was not reduced to writing until after the nursing home commenced the action in District Court.

Obviously, without the analyses of the experts having been reduced to writing, it would have been impossible to cross-examine at the review. By the Department's own rules, however, cross-examination on the opinions in the report would not have been permitted anyway. In an area where opinion testimony is so crucial, and where the qualifications of those rendering the opinions are equally crucial, the nursing home was advised that questioning of Federal and State officials would be limited solely to erroneous factual findings. Even then, those responsible, to a large extent, were not present to answer those questions, and when counsel

did attempt to seek answers from those present, the answers were not forthcoming.

This Court, in 1972, held, in effect, that the Case Nursing Home, as a member of the Maxwell class, was not to be closed by the State of New York without a full administrative hearing. Now, by changes in the law which should not affect the rights of the Case Nursing Home, the Federal government will do just that. It is difficult to find a legal principle which would allow a nursing home which has served the community for almost four decades to be forced to cease existing without a meaningful and timely opportunity to be heard.

B. THE SECRETARY'S ACTIONS WERE UNLAWFUL, AND MUST BE SET ASIDE UNDER THE ADMINISTRATIVE PROCEDURE ACT, IN THAT SAID ACTIONS WERE:

1. Arbitrary, capricious, an abuse of discretion, and otherwise not in accordance with law.

2. Contrary to the Constitutional rights of the appellant.

3. In excess of the Secretary's Statutory authority and statutory limitations, and fell short of plaintiff's statutory rights.

4. Done without observance of procedures required by law.

5. Not supported by substantial evidence.

Appellant, Case Nursing Home, in addition to its Constitutional and Social Security Act claims, also alleged in its complaint and argued below that the Secretary's actions were unlawful in many respects under the Administrative Procedure Act and must be set aside.

Below, the Secretary basically attempted to answer only one of the claims and ignored all others. His response was to address only the claim of lack of substantial evidence, and to do so by submitting to the District Court on May 1, 1975, what was certified to be the administrative record regarding the Case Nursing Home's application for waivers (Transcript, Index No. 72), and to offer little more than the conclusory statement that the Secretary's action was supported by substantial evidence.

The Court below, likewise, in rendering its decision dealt with only a few of appellant's claims, and then only in a passing and conclusory fashion. It stated that assuming the Secretary's actions to be subject to Act, the decision was supported by substantial evidence, was not arbitrary or capricious or in violation of plaintiff's constitutional rights, again analogizing the termination of appellant's provider agreement, as it had done in discussing appellant's Constitutional claims, to the initial denial of grants under the aspects of the Social Security Act (Decision, p. 30).

The Sequence and Substance of the Agency's Actions

As the HEW certified administrative record shows, its actions in regard to the appellant spanned a period of about five months, from October 24, 1974 when a federal fire safety survey was conducted, until March 25, 1975, when the

final decision denying waivers was rendered. (Transcript Index No. 72). It is important to appellant's Administrative Procedure Act contentions to appreciate what appellant knew and was advised by the Agency during that period, not thereafter, and more importantly, what it did not know and was never advised of by the Agency during that period. Appellant's first notice of HEW action was the Region II letter to it of November 5, 1974 (Transcript, Index No. 72, Exhibit 5), advising that a recommendation had been made that appellant's facility did not meet the Life Safety Code, and is not entitled to waivers of such deficiencies. A list of specific deficiencies was enclosed, as well as prior survey reports. Those reports are set forth in the Administrative Record as Exhibits 1 through 4.

None of those reports do any more than list specific Life Safety Code deficiencies. None of those reports, while ample space is provided therein for such, contains any discussion regarding waivers, the standards governing waivers, or any explanation why waivers are denied. For example, in Exhibit 1, page 12 provides a full page for discussing waivers, and it is blank. In Exhibit 2, it is stated that waivers are not recommended because the facility does not meet the Life Safety Code. In Exhibit 3, page 12 is provided for discussion of waivers, and page 13 for discussion of plans of correction, and both are blank. In Exhibit 4, the

only federal survey, a third of every page is reserved for explanatory remarks, and the total explanation provided amounts to a dozen words, being only notations of measurements relating to the deficiencies. Therein, page 9 is provided for discussion of waivers and the only comment is "none." Returning to Exhibit 5, the November 5, 1974 Region II letter which was the first notice of the Agency's action, it too only lists specific deficiencies, with no explanation regarding the denial of waivers, or the standards governing such denials. That letter further states that a review before Region II officials may be requested, and there will be an opportunity to present evidence in the presence of HEW and State officials responsible for the recommendation. As of November, 1974, then, as appellant looked toward its December meeting with Region II officials, all it had to go on at that point were two pieces of information, one a fact, and the other a surmise. The fact was that it had Life Safety Code deficiencies. This it already knew. What it needed to know was what was the standard governing waivers of deficiencies. As to that, on the information provided to that point, it could only surmise that the standard appeared to be that a facility that had deficiencies was not entitled to waiver of deficiencies because it had deficiencies.

Nevertheless, while in an impossible situation as far as adequately preparing for the "review" meeting proferred,

appellant did attend such a meeting on December 17, at the Region II offices, with counsel and accompanied by a fire safety expert.

The bulk of the Administrative Record is a transcription from a tape recording of that meeting. First, while the November 5, 1974 letter stated that the person who would make the final determination, Mr. Saperstein, the Director of the Office of Long Term Care would preside over the meeting, it was conducted, rather, by Mr. Saperstein's subordinate, a Mr. Berkowitz. Next, while the November 5, 1974 letter stated that the State and Federal Officials responsible for the adverse recommendation would be present, only one of the many individuals whose names appeared in the documentation provided appellant was present, and when he was asked a question, he did not know the answer. (Transcript, Index No. 72, Transcript, Pages 42-44). While appellant's fire expert spoke at length as to why appellant's facility is safe, and would be even safer with proposed alterations, no official present at the meeting at any time addressed the issue of safety, or even gave the appearance of having considered it. Again, there was no elaboration or explanation by any of the officials as to the standard governing denial of waivers, other than some comments that only served to reinforce appellant's surmise that the rule was that deficiencies won't be waived because there are deficiencies. An example of this is at page 23 of the Meeting Transcript:

VOICE: What you are saying is that because of the sprinklers the requirement for 1-3/4" door is not necessary.

(Appellant's Fire Expert): That's right.

VOICE: But you are not saying that the Code or the regulation do not require a solid core door.

(Expert) I did not say that.

VOICE: O.K.

As a result of this December meeting, appellant was still completely in the dark as to what, if anything, would satisfy HEW. This confronted appellant with two very real problems, one legal and one practical. As to the legal problem, it was not possible to defend against or challenge the Agency's position before the Agency because it was not known what it was. As to the practical problem, appellant was willing to make substantial and expensive structural alterations in her facility to achieve sufficient compliance, but HEW would never reveal what would suffice. Accordingly, it was impossible to even plan or propose alterations, and it would have been foolhardy, under the circumstances, to go ahead and spend thousands of dollars making them, on sheer speculation as to what might strike HEW as acceptable. Ordinarily, anyone facing Administrative Agency action has two options, fight, or comply. Appellant, however, was deprived of both options by the manner in which the Secretary proceeded.

Moreover, it is worth noting as background the dilemma that appellant and numerous other smaller wood-frame

nursing homes found themselves in regarding the extent of structural alterations. Appellant was willing to tear down her structure and completely rebuild. However, to do so, an operator must obtain the approval of State authorities. It is a matter of public record that a number of nursing home operators in appellant's area applied for permission to completely rebuild, but were denied on the purported ground that there was no need for skilled nursing facilities beds. Accordingly, the only way appellant and others in her situation could remain in business was in their existing structures, while at the same time Federal authorities would not reveal what alterations would be acceptable, except for vague and occasional intimations that nothing short of total reconstruction would suffice.

Appellant's counsel attempted to address this difficulty in the closing minutes of the meeting in December at the Region II offices. (Transcript, Index No. 72, Transcript, Pages 56-58). Appellant's counsel stated that plans of correction would be submitted within 30 days, and asked whether his understanding that the officials would get back to the appellant and advise them of the results of the review of the plans before any decision would be made, and he was told by the presiding officer at the meeting that his understanding was correct. Further, one of the Federal engineers present, after being asked by the presiding officer to elaborate on what give and take there would be,

reiterated that recommendations as to acceptance, modification or rejection of proposed alterations would be communicated to appellant prior to HEW taking further steps.

As of December, then, appellant came away from the Region II meeting still completely in the dark as to HEW standards on waivers, but for the first time, with some hope and assurance that such would be revealed before the final decision by HEW was made, and that there would be some opportunity for discussion and give and take to achieve sufficient compliance. Within just slightly more than the 30 days after the meeting, appellant submitted plans of corrections running to 15 pages (Transcript, Index No. 72, Exhibit 7), and awaited the promised reply, discussion and give and take, which would constitute its first opportunity to learn anything about the Agency's waiver standards.

Appellant waited in vain, for it never came. Rather, without any intervening discussion or warning, appellant was abruptly advised by letter from Alan J. Saperstein, Director, Office of Long Term Care Standards Enforcement, dated March 25, 1975 of a final decision denying waivers. (Transcript, Index No. 72, Exhibit 8). Nor did even this communication, the last to appellant from HEW, reveal any standards. It simply stated that the promised corrections would not "comply with the equivalent Fire Safety standards necessary for this office to find that the safety of patients is not in jeopardy," without revealing

what those standards might be. Further this letter further strengthened appellant's surmises that Region II was wholly failing to go beyond the issue of Code violations and address the more important issue of safety and waiver of violations, that its standard was complete Code compliance, and tha its circular criteria for denying waiver of deficiencies was the presence of deficiencies. As stated in the letter, the "basis of this decision is our conclusion that even if the plan of correction..... were implemented, your facility would not meet the requirements of the Code....."

Some additional aspects of this March 25 notice of final determination letter are worth noting. First, we know by comparison with the letter received by the co-plaintiff below, Louise Ungaro doing business as Phillips Nursing Home, and who for a time was co-appellant herein until she withdrew to close her nursing home business, that the the phrases quoted above are but boiler plate, being precisely the same, word for word in both letters. Further, the same errors are repeated in both letters. In both, Mr. Saperstein states that after "careful consideration" of survey report findings, "and all other documents and statements submitted to this office during and subsequent to the review before me on December 17, 1974," the determination was made. As a matter of fact, however, the review was not before Mr. Saperstein at all, but rather his subordinate Mr. Berkowitz. Further, Mr.

Saperstein could not have very readily carefully considered what occurred at the review meeting, as it was stipulated below that the tape recording of the meeting was not transcribed until after he made his final determination, and that further, he never listened to the tape.

In summary then, from the very record that the Agency certifies reflects its actions up through and including its final determination on March 25, 1975, facts important to assessing appellant's Administrative Procedure Act claims stand out. One is that the review proceeding, which appears, incidentally, to be only an invention and creature of Region II, and which constitutes the bulk of the certified Administrative Record, and which further the Federal Appellee, once in court, elevates and relies upon as the heights of due process, is so little regarded at the Agency level that the decision maker does not attend the review, listen to the tape thereof, or have it transcribed prior to making his final determination. Other facts that stand out are that at no time throughout the five months of Agency action did it ever reveal to the appellant its standards regarding the denial of waivers, or its evidence or analyses as to how the health or safety of appellant's patients would be adversely affected, nor did it ever give appellant any opportunity to ascertain these items. And finally, it appeared through March 25th that if HEW had any standards at all, it was that the only

deficiencies could be waived was if there were no deficiencies at all, which is a criterion that can never be met by a wood-frame facility.

It was only after this lawsuit was commenced, and temporary restraint of the Secretary had been obtained, and trial was to commence in only two days that HEW officials revealed anything further. By affidavits of Mr. Saperstein and others dated May 5, 1975 (Affidavits, Index Nos. 99, 101 and 115), appellant learned for the first time, some six months after Region II initiated its action, and some six weeks after its final decision, what Region II's waiver standard was. It was an "interim policy" of denying Life Safety Code waivers to wood-frame nursing homes if they had a single other Life Safety Code violation. As appellant's fire safety expert set forth in an affidavit (Transmittal Index No. 143), he had participated in ten Region II "reviews," that this was the first he had ever heard of this standard, and that it was an erroneous standard both as far as the Life Safety Code, and fire safety itself were concerned. Additionally, the Federal appellee by the same affidavits proferred some safety anaylses that had been written on April 29, 1975, stating that such had been orally discussed among Region II officials prior to the March 25, 1975 final determination.

When at last made aware of the Region II wavier criteria, and some of the reasoning of its officials, appellant for the first time was able to determine that appellant's surmises were correct -- the reasoning was largely devoted to the fact of deficiencies rather than addressing the real issue of safety, and the standard for denying waivers employed offered room for only one more violation than appellant had suspected, which had been none. However, even if the reasoning had turned out to be perfect and unassailable, and the wavier denial criteria properly in accord with that established by Congress, it would have been meaningless as far as affording fair administrative prorocedure to the appellant, coming as it did, only after the Agency action had been concluded. And no reason is apparent why appellant could not have been informed of the waiver criteria being employed back in November, 1974 when Region II initiated its action. Further, no reason is apparent why appellant, in the course of its five months dealings with the Agency, could not have been advised of some of the reasoning of the Region II officials, even if only orally. More generally, no reason is apparent for the entire manner in which the Agency proceeded from beginning to end, revealing nothing more than lists of violations, and the bare conclusion that waviers would be denied, and refusing to provide any type of meaningful opportunity to defend and be heard, whether before, during, or even after its determination.

Measuring this course of conduct against the requirements of administrative fair play makes clear that it was unlawful, and must be set aside.

(1). The Secretary's Actions Must Be Set Aside as Arbitrary, Capricious and an Abuse of Discretion

The Agency's action was arbitrary, capricious, and an abuse of discretion, and otherwise not in compliance with law in at least four different ways:

(a) It failed to provide the basic fairness of due notice.

(b) There was a complete lack of reasoned findings.

(c) The Agency ignored the statutory purpose, which is per se unreasonable.

(d) The whole manner in which the Agency proceeded was arbitrary and unreasonable.

(a) Basic Fairness of Due Notice

In L & M Industries v. Kenter, 458 F.2d 968 (2d Cir. 1972), this court dealt with Food and Drug Administration's refusal to permit the importation of a drug, or to grant the importer a hearing, while offering as the only reason for its action that the drug was "misbranded." The court noted that one whose drug is being excluded has the right to introduce testimony by statute, and that:

> Implicit in that "right to introduce testimony" is the right to know what the issues are that the testimony is to relate to. 458 F.2d at 971.

The Court further held that it was too obvious to require elaboration that just stating the conclusion of "misbranded" was insufficient, and that there must be a statement of the grounds on which the product is refused admission.

Appellant has contended that she too was entitled to a hearing prior to the Agency's determination. The Court below held that appellant was entitled to a full adversary hearing after the determination, at least. And in any event, the Agency purported to offer appellant an opportunity to be heard in the December review. However, as in the L & M Industries case, at no time, before, during, or after did HEW offer more than a conclusory reason for denying waivers, or inform appellant of the issues that the testimony was to relate to.

Similarly, in Hess & Clark Div. of Rhodia, Inc. v. Food and Drug Administration, 495 F.2d 975 (D.C. Cir. 1974), the F.D.A. tried to act summarily, this time in ordering an end to the use of a chemical in cattle. The Court held that basic fairness must govern even Agency's summary judgment proceedings, and that the Agency must give "adequate notice;" further, to enable one to prepare an informed response, ordinarily, an agency must specify the

nature of the evidence and the facts upon which it proposes to take action. 495 F.2d at 983. The court held that the agency should have given the respondents test results and an opportunity to respond.

Herein, appellant contends that at a minimum she should have been provided, in advance of the review proceedings, with the standards governing grant and denial of waivers and the opinions of the Region II officials.

In Hess, the Court went on to state that a higher standard of specificity is required when the procedure is summary. For notice to be adequate, the court stated that:

> Of course, Administrative Agencies are not bound by the same details of procedures of the courts. But the Agencies are governed by the same basic requirements of fairness and notice, and these include specificity of notice and opportunity to respond if what is instituted is intended to be a procedure for summary disposition without a hearing.
>
> (It) is critical (that there be given notice of) the information which leads him to conclude, of course tentatively and subject to dispute and hearing, that approval....should be withdrawn. 495 F.2d at 984.

In this case as well, then, since HEW was attempting to proceed summarily, it was all the more crucial that adequate notice be given to appellant.

The similarities between this case and the Hess case continue still further. In Hess, the FDA banned the drug on the grounds that residues of it were found in cattle liver. The court held that the FDA was slighting its responsibility to consider the issue of safety, and the

relationship between the residue and safety, stating that when the FDA proposes to withdraw a drug because of residues, "it has the initial burden of coming forward with some evidence of the relationship between residue and safety...," noting that the statute does not state that because a drug leaves a residue, it is per se unsafe. 495 F2d at 992-93.

Similarly, in appellant's case, HEW has refused throughout to offer any evidence in regard to the issue of patient safety, as opposed to Life Safety Code violations, nor shown any evidence of even considering the relationship between the two. Here, as in Hess, the statute does not say that because there are Life Safety Code violations, a provider agreement must be terminated; rather, it starts with the assumption that there are violations, and asks the Secretary to consider whether those violations adversely affect the health and safety of the patients.

Finally, the court in Hess further held that after granting a hearing, the FDA must still consider the degree of safety, noting that all drugs are unsafe in some degree, and that further, it must consider alternative remedies, such as merely banning the sale of liver, which was where the residues were found.

Nothing in the certified Administrative Record of this case, nor anything supplied by HEW to the court below reveals any consideration of the degree of safety, nor any consideration of any other alternative but complete termination of appellant's provider agreement.

The situation in Hess fairly parallels that of the appellant. Yet not one of the many agency fair procedure requirements set forth therein, and particularly the initial and primary requirement of a higher standard of specificity in providing the basic fairness of due notice when the procedure is summary, was afforded to the plaintiff.

Richardson v. Wright, 405 U.S.208 (1972) is an example of what barely passes muster in meeting the requirement of providing adequate notice. Therein, the Court dealt with the claim that hearings were required before suspension of disability benefits. The Court vacated and remanded for further proceedings below because the Secretary had recently promulgated regulations mandating advance notice of such determinations, with reasons, and an opportunity to submit rebuttal evidence. The majority did not specifically approve these provisions as adequate, but rather remanded to provide an opportunity to determine how they would be applied. The decision was 5-4, with the dessentors strongly arguing that even the new regulations were inadequate on Goldberg v. Kelly grounds.

Appellant's situation is much more analogous to the suspension of existing benefits as dealt with in Richardson v. Wright, than to the analogy offered by the court below herein to an initial denial of disability benefits. Yet, appellant was not even afforded what barely got

by in Richardson v. Wright. In particular, it was never given any advance notice of the reasons for the Secretary's denial, nor any real opportunity to submit rebuttal evidence, since the criteria were unknown to appellant. In contrast, the standards governing the grant and denials of disability benefits have long been well and clearly established under statutes, regulations, and case law, whereas regarding appellant, the Secretary's authority regarding Life Safety Code waivers is quite recent. The statutory standards governing such have not been elaborated in regulations or in any other manner available to the public; there are no reported cases dealing with the question; and appellant is apparently among the first that the Secretary has proceeded against. Additionally, the Secretary attempted to proceed in the summary manner. Under all the circumstances, the need for adequate advance notice was all the more heightened, and the Secretary's failure to provide it was, accordingly, clearly arbitrary, capricious and unreasonable under the circumstances.

(b) Lack of Reasoned Findings

Going hand in hand with the requirement that an agency give reasonably adequate notice of what it intends to do is the further requirement that having acted, it set forth reasoned findings supporting the action taken.

In the case of Baltimore & Ohio Ry. v. Aberdeen & R.R. Co., 393 U.S.98 (1969), the I.C.C. based an order on the assertion that one thing was the same as another, with insufficient evidence to support it. There it was that certain average costs represented the particular costs in issue. Likewise, HEW in this case asserts that any two Life Safety Code deficiencies equal a lack of safety. The Supreme Court affirmed the three-judge-court reversal of the order, stating that to accept such assertions without adequate evidence would be to abdicate to the claim of "expertise," and that it was impermissible under the Administrative Procedure Act to not insist that Agency determinations be supported by substantial evidence and reasoned findings; otherwise, expertise becomes a "monster which rules with no practical limits on its discretion." 393 U.S. at 91-92.

Similarly, in S.E.C. v. Cherney Corp., 318 U.S. 80 (1943), the Supreme Court held that whether Agency action is based on a determination of law, or depends on the exercise of judgment, in "either event, the orderly functioning of the process of review requires that the grounds upon which the agency acted be clearly disclosed and adequately sustained." 318 U.S. at 94.

Likewise, this court has held in L & M Industries v. Kentor, 45o F2d 968, 971 (2 Cir. 1972), as previously

noted, that it is too obvious to require elaboration that the FDA's merely resting upon its assertion that a drug is misbranded will not suffice. This court has reiterated that requirement in another context in United States ex rel. Checkman v. Laird, 469 F.2d 773, 780, 787 (2d Cir. 1972), stating that administrative agencies, when required by law, must state reasons, and their decision must stand or fall on the reasons stated; further that this requirement of the statement of reasons is meaningful, and it cannot meaningfully be satisfied by a bare recitation of the statutory criteria. To comply, the reasons must identify salient facts.

Measured against these standards, the complete absence in the administrative record certified by the Secretary of any reasons for the denial of waivers beyond the conclusory recitation that health and safety would be adversely affected, and the refusal of HEW to reveal any of its reasoning until the eve of the trial of this lawsuit below, compels the conclusion that the Agency's action was arbitrary and unreasonable and that it must be set aside. Courts must insist that Agencies conjoin articulated standards and reflective findings so that there will be even-handed application of the law rather than whim, or misplaced zeal. Greater Boston TV Corp. v. FTC, 444 F.2d 841 (D.C. Cir. 1970). Here, it does not appear that there has been

even-handed application of the law, or anything but whim and misplaced zeal.

(c) The Secretary Has Acted Unreasonably In Ignoring the Statutory Purpose Governing Granting of Waivers

Where an agency ignores the purpose of a statute, its action is per se without rational basis, and a court would be doing less than its duty if it did not set it aside. See, Operating Engineers v. Arthurs, 355 F.Supp. 7 (D. Ct. Okla.), aff'd 480 F.2d 603 (10th Cir. 1973). This aspect of HEW's arbitrary action will be set forth more fully below in the discussion of appellant's contention that the Agency exceeded its statutory authority, particularly in establishing a "wood-frame plus one other violation" waiver denial rule.

(d) The Whole Manner in Which The Agency Proceeded was Arbitrary

Particular deficiencies in the manner in which Region II officials proceeded in regard to appellant have been previously set forth, and other specific deficiencies will be discussed hereafter, but it should not be forgotten that each constitutes but an aspect of an overall requirement of Agency fairness.

What the Supreme Court said of HEW's Food and Drug Administration would apply with equal force to HEW's Region II Office of Long Term Care Standards Enforcement: it "does not have unbridled discretion to do what it pleases. Its procedures must satisfy the rudiments of fair play." Weinberger v. Hyson, Wescott & Dunning, Inc., 412 U.S. 609, 627 (1973).

(e) The Agency's Actions Were Contrary To Appellant's Constitutional Rights And Must Be Set Aside Under The APA

The Administrative Procedure Act, 5 U.S.C. § 706(b), provides that a ground for setting aside agency action is that it was contrary to constitutional rights. While Appellant asserts this as an additional ground under the APA, the violations of Appellant's constitutional rights have been clearly demonstrated previously in this memorandum, and the discussion need not be repeated here.

(f) The Region II Actions Exceeded Statutory Authority and Limits, And Fell Short of Appellant's Statutory Rights.

HEW's actions exceeded its statutory authority and limits, and fell short of plaintiff's statutory rights in three respects, and accordingly must be set aside under the Administrative Procedure Act, 5 U.S.C. § 706(c).

These three statutory deficiencies were:

(1) Failure to provide the notice, hearing and review rights provided under Title XVIII of the Social Security Act.

(2) Failure to provide the notice, hearing and review rights provided under the Administrative Procedure Act itself.

(3) Applying different and stricter criteria in denying Life Safety Code waivers than the standards enacted by Congress.

(1) Failure to Provide Social Security Act Hearing Rights.

This failure of HEW has been previously discussed in another portion of this brief. See II, A(3), supra.

(2) Failure to Provide APA Hearing Rights.

In § 554 of Title 5, United States Code, the Administrative Procedure Act provisions that are to govern all instances when a statute requires adjudication to be determined on a record, after an opportunity for agency hearing are set forth. It provides that where one is entitled to notice, that he be timely informed of the time, place and nature of the hearing, the legal authority and jurisdiction under which the hearing is held, and the matters of law and fact asserted. Additionally, it provides that the agency generally should provide an opportunity

for pre-hearing informal resolution. Finally, it provides that the hearing officer cannot consult with anybody regarding the facts unless all parties are present, or be subject to those performing the agency investigative or prosecuting actions. That HEW afforded just about none of these rights to Appellant has already been set forth in detail, and by way of example Appellant would only note again that the hearing officer, Mr. Berkowitz, was the subordinate of the decision maker, Mr. Saperstein, and that further that it is clear from the stipulation below that Mr. Saperstein consulted with Mr. Berkowitz without all the parties present, particularly the Appellant.

5 U.S.C. § 556 provides, as to the conduct of hearings, that the presiding officer be impartial, that there be no order unless supported by and in accordance with reliable, probative and substantial evidence, that the respondent be entitled to present evidence, to rebuttal, and to cross-examination, and finally that there be a transcript of the proceeding, plus all documents introduced therein, which shall constitute the exclusive record of the agency.

None of this was afforded the Appellant. The hearing officer was in no position to be impartial. That however, is perhaps irrelevant in that the hearing officer did not make the final decision; rather, this superior did without the benefit of either a tape or a transcript of the hearing. The termination of Appellant's provider agreement

is not supported by reliable, probative and substantial evidence. Appellant was not permitted to crossexamine agency officials. Finally, HEW's efforts below to reveal its standards and reasoning by affidavit, after its final determination, is not in accord with the provisions governing what shall constitute the exclusive record.

Finally, 5 U.S.C. § 557 requires, inter alia, a statement of the agency's findings and conclusions, and the reasons and bases therefor, and all material issues of fact, law or discretion presented on the record. Clearly, there was no compliance with these provisions.

The Appellees will perhaps argue that Appellant is not entitled to the protection afforded by the above sections. HEW raised such a contention in Coral Gables Conv. Home, Inc., v. Richardson, supra, and the Court rejected it. Therein, a fiscal intermediary cut a Medicare nursing home's current payments by 50%, after an audit and informal review tended to indicate past overpayments. Neither the Medicare Law nor regulations provided for any type of review of this type of determination. The plaintiffs argued that they were entitled to hearings prior to the withholding of funds under Goldberg v. Kelly. The Court held that the constitutional argument was unnecessary. It found that it was clear that anyone aggrieved by agency action has the right to a trial-type adjudication of the

facts. It is important to read the Coral Gables holding and relief portions carefully. On a cursory reading it might appear that the Court concluded that post-termination hearings would be adequate. What the Court actually held, however, was that the failure to provide at least post-audit hearings was unlawful, and that therefore the money was wrongfully withheld. The relief afforded was the same as is provided by §§ 554, 556 and 557 of the Administrative Procedure Act. The Court ordered immediate hearings, and to the extent that such was necessary, that new regulations governing the same be adopted immediately. It required that the Secretary give notice within 20 days and to give a full adversary hearing within 15 days after the request, if the request was made within 10 days after the notice. The Secretary was ordered to permit the introduction of evidence and cross-examination. He was ordered to provide an impartial decision maker with no prior participations and who must state his reasons and the evidence upon which he relies. The Court further ordered that all monies withheld be deposited in the Court, and that no more monies be withheld until the plaintiff was afforded a fair hearing.

No reason is apparent for treating the Appellant, Case Nursing Home, any differently under the Administrative Procedure Act than the Coral Gables Convalescent Center.

(3) The Region II Interim Policy of Waiver Denial Upon Wood Frame Plus a Single Life Safety Code Deficiency Exceeds the Congressional Standard.

For almost 200 years under our Constitution, it has been a fundamental principle that the Congress makes the laws, not the Executive.

Nevertheless, the Executive has often encroached upon this division of powers, generally with the best of intentions; however, almost without exception, the Judiciary, when called upon, has acted to restore and preserve the separation of powers.

There are numerous examples. In S.E.C. v. Cherney Corp., 318 U.S. 80 (1943), the agency felt that it was not good that reorganization managers of a corporation be permitted to purchase what was to become the voting stock of the reorganized corporation. The Supreme Court reversed, noting that while the agency might be right, it did not have the power; Congress had not gone so far.

Another example of agency good intentions outracing agency authority is Kettell v. Johnson and Johnson, 337 F. Supp. 892 (D. Ark. 1972). Therein, where the skills possessed by plaintiff and only a few others were required seven days a week by the defendant employer, and the plaintiff refused to work on one day of the weekend on religious grounds, the Court held that the Equal Employment Opportunity

Commission's ruling that the employer require others to work in his place so that he might be continued in employment went beyond the congressional prohibition of no discrimination in employment based on religion. In L & M Industries v. Kenter, supra, this Circuit held that where agency action exceeds the authority delegated by Congress, judicial relief is appropriate. Moreover, a District Court in this Circuit has held that where HEW regulations are not sufficiently clear to enable a determination whether HEW has exceeded its statutory authority, the HEW ruling based on those regulations must be set aside, and the matter remanded to the agency for further proceedings, including the redrafting of the regulations. Matczak v. Secretary, HEW, 299 F. Supp. 409 (S.D.N.Y. 1969). Such relief would appear to be all the more appropriate here, where the Secretary issued no regulations at all, and such indications as were available indicated that he had exceeded the statutory standard.

Much more to the point, it is clear from the legislative history of the enactment of the Life Safety Code requirements, and from decisions of this Court that the Region II criteria of wood frame construction plus one Life Safety Code violation requires waiver denial is an excessive standard. It is clear that such a rigid application was not intended, expected, or authorized by Congress:

> The committee expects that such codes will be enforced in a manner designed to properly protect the health and safety of the patients. At the same time, however, it is expected that due recognition will be given to waivers of specific conditions where rigid interpretations would result in undue hardship and heavy and avoidable expense, and where such temporary or permanent waiver of requirements will not jeopardize the health or safety of patients in such institutions. (Senate Report No. 744, 2 U.S. Code Cong. & Admin. News 3028 (1967)).

Moreover, as the Secretary must be well aware, such a rigid interpretation has already been rejected in this Circuit regarding Life Safety Code waivers. One of the reasons relied upon by this Court in ordering state hearings on the issue of waivers was that the state authorities had misread Federal regulations to the extent that state authorities contended that no wood buildings could receive a waiver. Maxwell v. Wyman, 458 F.2d 1146 (2d Cir. 1972). In the second Maxwell decision, this Court stated that it recognizes the vigorous campaign to upgrade nursing home care, but that upgrading could not be done arbitrarily. 478 F.2d 1326, 1328 (2d Cir. 1973).

It can be argued that nothing short of the highest possible safety standards should be required of nursing homes. The Court below appeared to hold such a view; the balancing discussed in its decision seems to say that lack of optimum safety, however slight, must outweigh facility

economic injury and patient disruption, however great. It could be argued that the Life Safety Code should apply without exception, and that no waivers be permitted. On the other hand, it could be argued that in light of increased demands for beds, spiraling Medicaid costs, the sterile institutional atmosphere of newer facilities, etc. that less than even ordinary safety standards should be permitted for the older, less expensive, homier existing facilities. As with, for example, the environmental quality versus energy shortage debate, there are numerous valid competing factors to be considered.

However, this Court is not the place to offer such arguments, nor is it the place of this Court, nor of the Court below, to decide among them. And neither is it the province or function of Region II of HEW to do so. Rather, such is solely the function of Congress.

The Congress did decide. It chose neither the highest standards nor no standards. It neither completely prohibited older wood frame facilities nor completely exempted them. Nor, particularly, did Congress rule that wood frame construction plus one Life Safety Code violation requires decertification. Rather, it adopted the middle ground, that of reasonable safety.

Region II's interim policy exceeds that standard. Its rule has bureaucratic appeal--it's much easier to check

off one code violation on a form than it is to carefully consider and analyze the issue of safety. Its rule has emotional appeal. It can issue press releases, as it did in this case, and let the public applaud the abstractly unassailable posture that nothing is too good when it comes to fire safety. The rule has many appeals, but it also has a fatal defect--it is without statutory authority.

(4). The Secretary's Actions Must be Set Aside Under the Administrative Procedure Act in That They Amount to Rule Making Without the Rule Making Procedures Required by Law.

Even assuming, for the purposes of argument, that Region II had the power to adopt its interim policy that wood frame construction plus one Life Safety Code violation requires denial of waiver, it is clear that such amounts to rule making. It is to apply to all cases, but it is neither a product of adjudication, nor of the Administrative Procedure Act rule making procedures.

The Act, 5 U.S.C. § 553, requires that for an agency to promulgate a rule, there must be general notice in the Federal Register. That notice must include, inter alia, the terms and substance of the proposed rule. The agency must give an opportunity to interested parties to participate in the submission of data, views and arguments. Then, the agency must consider the matter presented. Further upon adoption of the rule, it must state its basis and

purpose, and thereafter it must give the right to petition for issuance, amendment or repeal of rules.

This Court, in Pfizer, Inc. v. Richardson, 434 F.2d 536, 544 (2d Cir. 1970), in approving FDA regulations regarding drug efficacy and conditioning the granting of hearings on an initial manufacturer showing of efficacy, stated that it started with the proposition that if an administrative agency vested with rule making powers has promulgated, in rule making proceedings pursuant to Section 4 of the Administrative Procedure Act, such regulations, then they could be sustained. (Emphasis added). It is clear from the Court's decision that if the agency had not followed the rule making procedures, its action would be invalid, and the Court noted that previously in Pharmaceutical Mfgrs. Assoc. v. Finch, 307 F. Supp. 858 (D. Del. 1970), it had been so held regarding the very same regulations.

This Court has stated in another context that it is highly undesirable for an administrative agency to announce a per se rule without either rule making or an evidentiary hearing, thereby denying itself light on the proper contents which such proceedings would afford. NLRB v. Majestic Weaving Co., 355 F.2d 854 (2d Cir. 1966). A divided Supreme Court went further and stated that the rule making provisions of the Administrative Procedure

Act may not be avoided by the process of making rules in the course of adjudicatory proceedings. NLRB v. Wyman - Gordon Co., 394 U.S. 759 (1969). We need not go so far.

These cases all concern situations where the agency either first promulgated regulations, but did so improperly, or at least conducted evidentiary hearings. The conclusion of invalidity should follow all the more strongly in Appellant's case, where HEW Region II did neither. Just last year, the Supreme Court strongly reiterated these principles. In Morton v. Ruiz, 415 U.S. 199 (1974), the Court struck down a Bureau of Indian Affairs decision denying benefits to Indians who were not actually on the reservation, but only near it. It was found that on occasion the Bureau had given benefits to those near the reservation, but the Bureau defended on the ground that the statute used the word "on" rather than "near." The Court stated that no matter how rational or consistent with congressional intent a particular administrative decision with respect to dispensing of benefits may be, the determination of eligibility cannot be made on an ad hoc basis. It further stated that the Administrative Procedure Act was enacted to prevent inherently arbitrary, unpublished, ad hoc determinations, and that since the BIA's actions amounted to a legislative rule, it was required that it first be published in the Federal register for enforcement.

It is clear that the procedures governing the promulgation of drug efficacy rules or Indian benefits rules apply with equal force to safety rules. As the Supreme Court noted in Abbott Laboratories v. Gardner, 387 U.S. 136, 143 (1967), the legislative history of the Administrative Procedure Act revealed an attempt by some to insulate factual determinations, such as the permissible levels of poison in apple spray, from review, but that instead, Congress gave "generous" review of such. In the same case, at page 144, note 11, the Supreme Court quoted with approval the following language of this Court of Appeals in Toilet Goods Association v. Gardner, 360 F.2d 677, 683 (2d Cir. 1966), that:

> The agency determinations specifically reviewable...relate to such technical subjects as chemical properties of particular products and the formulation and application of safety standards for protecting public health; Congress naturally did not wish Courts to consider such matters without the benefit of the agency's views after an evidentiary hearing before it. (Emphasis added).

HEW Region II has clearly engaged in rule making without complying with the rule making procedures established by law, and accordingly its actions must be set aside.

(h) The Determination to Deny Waivers is not Supported by Substantial Evidence

Review for substantial evidence is, of course, to be upon the entire record, and not just the agency's proof. Universal Camera v. NLRB, 340 U.S. 474 (1951).

The contents of the certified administrative record, and more importantly, what it does not contain, have been previously detailed herein.

The agency has announced a conclusion that the granting of waivers would adversely affect the health and safety of the patients. While the record does contain evidence of Code violations, it contains no evidence or discussion whatever regarding a lack of safety. Rather, the only evidence in the record addressing the issue of fire safety was that set forth at length and in detail by the Appellant's fire safety expert that the fully sprinklered, ADT alarm equipped facility was reasonably safe and that it would be even safer in light of the proposed alterations.

The standard for denying waivers of Life Safety Code deficiencies is whether the safety of the patients would thereby be placed in jeopardy. Since there is lacking not only substantial evidence, but any evidence to support such a finding, the determination of the Region II Office of Long Term Care must be set aside.

III. CONCLUSION

The actions of the appellees, and the decision and judgment of the District Court denying appellant any relief except hearings after Medicaid participation termination and patient removal, must be reversed and vacated, and the matter remanded to the Secretary for further proceedings to be conducted in accordance with the Constitution.

Respectfully submitted,

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APPENDIX OF STATUTES

Social Security Act, 42 U.S.C.

§1395ff. Determinations--Appeals

(c) Any institution or agency dissatisfied with any determination by the Secretary that it is not a provider of services, or with any determination described in section 1866(b)(2) [42 USCS § 1395cc(b)(2)], shall be entitled to a hearing thereon by the Secretary (after reasonable notice and opportunity for hearing) to the same extent as is provided in section 205(b) [42 USCS § 405(b)], and to judicial review of the Secretary's final decision after such hearing as is provided in section 205(g) [42 USCS § 405(g)].

(Aug. 14, 1935, c. 531, Title XVIII, Part C, § 1869, as added July 30, 1965, P. L. 89-97, Title I, Part 1, § 102(a), 79 Stat. 330; Oct. 30, 1972, P. L. 92-603, Title II, § 299O(a), 86 Stat. 1464.)

§ 1396a. State plans for medical assistance

(a) Contents. A State plan for medical assistance must--

* *

(28) provide that any skilled nursing facility receiving payments under such plan must satisfy all of the requirements contained in section 1819(a) [42 USCS § 1395i-3(a)], except that the exclusion contained therein with respect to institutions which are primarily for the care and treatment of mental diseases and tuberculosis shall not apply for purposes of this title [42 USCS §§ 1396-1396d, 1396f- 1396i];

42 USCS § 1396d

* * * *

(f) Skilled nursing facility. The term "skilled nursing facility" means (except for purposes of subsection (a)(28)) an institution (or a distinct part of an institution) which has in effect a transfer agreement (meeting the requirements of subsection (l)) with one or more hospitals having agreements in effect under section 1866 [42 USCS § 1395cc] and which

* * * *

(13) meets such provisions of the Life Safety Code of the National Fire Protection Association (21st edition, 1967) as are applicable to nursing homes; except that the Secretary may waive, for such periods as he deems appropriate, specific provisions of such Code which if rigidly applied would result in unreasonable hardship upon a nursing home, but only if such waiver will not adversely affect the health and safety of the patients; except that the provisions of such Code shall not apply in any State if the Secretary finds that in such State there is in effect a fire and safety code, imposed by State law, which adequately protects patients in nursing facilities; and

§ 553. Rule making

(a) This section applies, according to the provisions thereof, except to the extent that there is involved —

(1) a military or foreign affairs function of the United States; or

(2) a matter relating to agency management or personnel or to public property, loans, grants, benefits, or contracts.

(b) General notice of proposed rule making shall be published in the Federal Register, unless persons subject thereto are named and either personally served or otherwise have actual notice thereof in accordance with law. The notice shall include —

(1) a statement of the time, place, and nature of public rule making proceedings;

(2) reference to the legal authority under which the rule is proposed; and

(3) either the terms or substance of the proposed rule or a description of the subjects and issues involved.

Except when notice or hearing is required by statute, this subsection does not apply —

(A) to interpretative rules, general statements of policy, or rules of agency organization, procedure, or practice; or

(B) when the agency for good cause finds (and incorporates the finding and a brief statement of reasons therefor in the rules issued) that notice and public procedure thereon are impracticable, unnecessary, or contrary to the public interest.

(c) After notice required by this section, the agency shall give interested persons an opportunity to participate in the rule making through submission of written data, views, or arguments with or without opportunity for oral presentation. After consideration of the relevant matter presented, the agency shall incorporate in the rules adopted a concise general statement of their basis and purpose. When rules are required by statute to be made on the record after opportunity for an agency hearing, sections 556 and 557 of this title apply instead of this subsection.

(d) The required publication or service of a substantive rule shall be made not less than 30 days before its effective date, except —

(1) a substantive rule which grants or recognizes an exemption or relieves a restriction;

(2) interpretative rules and statements of policy; or

(3) as otherwise provided by the agency for good cause found and published with the rule.

(e) Each agency shall give an interested person the right to petition for the issuance, amendment, or repeal of a rule. Pub.L. 89-554, Sept. 6, 1966, 80 Stat. 383.

§ 554. Adjudications

(a) This section applies, according to the provisions thereof, in every case of adjudication required by statute to be determined on the record after opportunity for an agency hearing, except to the extent that there is involved—

(1) a matter subject to a subsequent trial of the law and the facts de novo in a court;

(2) the selection or tenure of an employee, except a hearing examiner appointed under section 3105 of this title;

(3) proceedings in which decisions rest solely on inspections, tests, or elections;

(4) the conduct of military or foreign affairs functions;

(5) cases in which an agency is acting as an agent for a court; or

(6) the certification of worker representatives.

(b) Persons entitled to notice of an agency hearing shall be timely informed of—

(1) the time, place, and nature of the hearing;

(2) the legal authority and jurisdiction under which the hearing is to be held; and

(3) the matters of fact and law asserted.

When private persons are the moving parties, other parties to the proceeding shall give prompt notice of issues controverted in fact or law; and in other instances agencies may by rule require responsive pleading. In fixing the time and place for hearings, due regard shall be had for the convenience and necessity of the parties or their representatives.

(c) The agency shall give all interested parties opportunity for—

(1) the submission and consideration of facts, arguments, offers of settlement, or proposals of adjustment when time, the nature of the proceeding, and the public interest permit; and

(2) to the extent that the parties are unable so to determine a controversy by consent, hearing and decision on notice and in accordance with sections 556 and 557 of this title.

(d) The employee who presides at the reception of evidence pursuant to section 556 of this title shall make the recommended decision or initial decision required by section 557 of this title, unless he becomes unavailable to the agency. Except to the extent required for the disposition of ex parte matters as authorized by law, such an employee may not—

(1) consult a person or party on a fact in issue, unless on notice and opportunity for all parties to participate; or

(2) be responsible to or subject to the supervision or direction of an employee or agent engaged in the performance of investigative or prosecuting functions for an agency.

An employee or agent engaged in the performance of investigative or prosecuting functions for an agency in a case may not, in that or a factually related case, participate or advise in the decision, recommended decision, or agency review pursuant to section 557 of this title, except as witness or counsel in public proceedings. This subsection does not apply—

(A) in determining applications for initial licenses;

(B) to proceedings involving the validity or application of rates, facilities, or practices of public utilities or carriers; or

(C) to the agency or a member or members of the body comprising the agency.

(e) The agency, with like effect as in the case of other orders, and in its sound discretion, may issue a declaratory order to terminate a controversy or remove uncertainty. Pub.L. 89-554, Sept. 6, 1966, 80 Stat. 384.

§ 556. Hearings; presiding employees; powers and duties; burden of proof; evidence; record as basis of decision

(a) This section applies, according to the provisions thereof, to hearings required by section 553 or 554 of this title to be conducted in accordance with this section.

(b) There shall preside at the taking of evidence—

(1) the agency;

(2) one or more members of the body which comprises the agency; or

(3) one or more hearing examiners appointed under section 3105 of this title.

This subchapter does not supersede the conduct of specified classes of proceedings, in whole or in part, by or before boards or other employees specially provided for by or designated under statute. The functions of presiding employees and of employees participating in decisions in accordance with section 557 of this title shall be conducted in an impartial manner. A presiding or participating employee may at any time disqualify himself. On the filing in good faith of a timely and sufficient affidavit of personal bias or other disqualification of a presiding or participating employee, the agency shall determine the matter as a part of the record and decision in the case.

(c) Subject to published rules of the agency and within its powers, employees presiding at hearings may—

(1) administer oaths and affirmations;

(2) issue subpenas authorized by law;

(3) rule on offers of proof and receive relevant evidence;

(4) take depositions or have depositions taken when the ends of justice would be served;

(5) regulate the course of the hearing;

(6) hold conferences for the settlement or simplification of the issues by consent of the parties;

(7) dispose of procedural requests or similar matters;

(8) make or recommend decisions in accordance with section 557 of this title; and

(9) take other action authorized by agency rule consistent with this subchapter.

(d) Except as otherwise provided by statute, the proponent of a rule or order has the burden of proof. Any oral or documentary evidence may be received, but the agency as a matter of policy shall provide for the exclusion of irrelevant, immaterial, or unduly repetitious evidence. A sanction may not be imposed or rule or order issued except on consideration of the whole record or those parts thereof cited by a party and supported by and in accordance with the reliable, probative, and substantial evidence. A party is entitled to present his case or defense by oral or documentary evidence, to submit rebuttal evidence, and to conduct such cross-examination as may be required for a full and true disclosure of the facts. In rule making or determining claims for money or benefits or applications for initial licenses an agency may, when a party will not be prejudiced thereby, adopt procedures for the submission of all or part of the evidence in written form.

(e) The transcript of testimony and exhibits, together with all papers and requests filed in the proceeding, constitutes the exclusive record for decision in accordance with section 557 of this title and, on payment of lawfully prescribed costs, shall be made available to the parties. When an agency decision rests on official notice of a material fact not appearing in the evidence in the record, a party is entitled, on timely request, to an opportunity to show the contrary. Pub.L. 89-554, Sept. 6, 1966, 80 Stat. 386.

§ 557

§ 557. Initial decisions; conclusiveness; review by agency; submittals and decisions; record

(a) This section applies, according to the provisions thereof, when a hearing is required to be conducted in accordance with section 556 of this title.

(b) When the agency did not preside at the reception of the evidence, the presiding employee or, in cases not subject to section 554 (d) of this title, an employee qualified to preside at hearings pursuant to section 556 of this title, shall initially decide the case unless the agency requires, either in specific cases or by general rule, the entire record to be certified to it for decision. When the presiding employee makes an initial decision, that decision then becomes the decision of the agency without further proceedings unless there is an appeal to, or review on motion of, the agency within time provided by rule. On appeal from or review of the initial decision, the agency has all the powers which it would have in making the initial decision except as it may limit the issues on notice or by rule. When the agency makes the decision without having presided at the reception of the evidence, the presiding employee or an employee qualified to preside at hearings pursuant to section 556 of this title shall first recommend a decision, except that in rule making or determining applications for initial licenses—

(1) instead thereof the agency may issue a tentative decision or one of its responsible employees may recommend a decision; or

(2) this procedure may be omitted in a case in which the agency finds on the record that due and timely execution of its functions imperatively and unavoidably so requires.

(c) Before a recommended, initial, or tentative decision, or a decision on agency review of the decision of subordinate employees, the parties are entitled to a reasonable opportunity to submit for the consideration of the employees participating in the decision—

(1) proposed findings and conclusions; or

(2) exceptions to the decisions or recommended decisions of subordinate employees or to tentative agency decisions; and

(3) supporting reasons for the exceptions or proposed findings or conclusions.

The record shall show the ruling on each finding, conclusion, or exception presented. All decisions, including initial, recommended, and tentative decisions, are a part of the record and shall include a statement of—

(A) findings and conclusions, and the reasons or basis therefor, on all the material issues of fact, law, or discretion presented on the record; and

(B) the appropriate rule, order, sanction, relief, or denial thereof.

(Pub.L. 89-554, Sept. 6, 1966, 80 Stat. 387.)

§ 706. Scope of review

To the extent necessary to decision and when presented, the reviewing court shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of an agency action. The reviewing court shall—

(1) compel agency action unlawfully withheld or unreasonably delayed; and

(2) hold unlawful and set aside agency action, findings, and conclusions found to be—

(A) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law;

(B) contrary to constitutional right, power, privilege, or immunity;

(C) in excess of statutory jurisdiction, authority, or limitations, or short of statutory right;

(D) without observance of procedure required by law;

(E) unsupported by substantial evidence in a case subject to sections 556 and 557 of this title or otherwise reviewed on the record of an agency hearing provided by statute; or

(F) unwarranted by the facts to the extent that the facts are subject to trial de novo by the reviewing court.

In making the foregoing determinations, the court shall review the whole record or those parts of it cited by a party, and due account shall be taken of the rule of prejudicial error. Pub.L. 89-554, Sept. 6, 1966, 80 Stat. 393.

UNITED STATES COURT OF APPEALS
SECOND CIRCUIT

MABEL M. CASE,
d/b/a CASE NURSING HOME
and LOUISE UNGARO,
d/b/a PHILLIPS NURSING HOME,

Plaintiffs,
Appellants,

-vs-

CASPAR WEINBERGER, as Secretary of the United States Department of Health, Education & Welfare; BERNICE L. BERNSTEIN, as Regional Director for Region II of the United States Department of Health, Education & Welfare; ALAN J. SAPERSTEIN, Director, Office of Long Term Care, Region II, HEW; ABE LEVINE, Commissioner of the New York State Department of Social Services; and JOHN LASCARIS, Commissioner of the Onondaga County Department of Social Services,

Defendants,
Appellees

AFFIDAVIT OF SERVICE

Docket No. 75-6038

STATE OF NEW YORK)
COUNTY OF CAYUGA) SS.:

MICHAEL A. WINEBURG, being duly sworn, deposes and says:

I am not a party to this action, I am over the age of 18 years, and I reside at 6 Boyle Avenue, Auburn, New York.

On June 5, 1975, I served a copy of the brief filed in this action on the following persons, the attorneys for Appellants in this action, at the following addresses, the addresses designated by said attorneys for that purpose by depositing a copy of

MICHAELS, MICHAELS
AND WINEBURG
ATTORNEYS AT LAW
410 METCALF PLAZA
AUBURN, NEW YORK

same enclosed in a postpaid properly addressed wrapper in an official depository under the exclusive care and custody of the United States postal service within the State of New York.

(1) Eloise Davies, Esq.
Appellate Section
Civil Division
Department of Justice
Main Justice Building
Room 3636
Washington, D.C. 20530

(2) John Dufur, Esq.
Assistant Attorney General
Department of Law
Albany, New York 12224

(3) John LaParo, Esq.
Legal Department
Department of Social Services
300 East Fayette Street
Syracuse, New York 13202

MICHAEL A. WINEBURG

Sworn to before me, this
5th day of June, 1975.

Natalie Coleman
Notary Public

NATALIE COLEMAN
NOTARY PUBLIC, STATE OF NEW YORK
No. 1384
Residing in Cayuga Co. at time of Appoint.
Commission expires March 30, 1977

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